§ 7.—*Security.*

It is usual to take security for every Government contract. I think as a rule it is better to have the security in a separate bond, and not included as a clause in the contract. I shall make some remarks on the law of the subject presently.

§ 8.—*Waiver.*

Here forest officers should be careful to keep to the terms of a contract: if they *allow* them in the course of the work *to be varied* (without a distinct writing made for the express purpose), difficult questions may arise as to Government having *waived* strict performance.

SECTION IV.—ON SOME PARTICULAR KINDS OF CONTRACTS.

I shall now add a few notes on some special kinds of contracts which forest officers are likely to be concerned with[8].

§ 1.—*Sale of Goods.*

In a sale of goods, the contract is effected by the offer and acceptance of ascertained goods (*i.e.*, goods in existence at the time and known to the parties) for a price. Either the goods are delivered as the price is paid, or there is a part payment or part delivery, or an agreement, express or implied, that the payment, or delivery, or both, shall be postponed.

The sale is complete when the whole or part payment is made, or the whole or part of the goods is delivered. But if the delivery or payment, or both, is postponed, the property passes when the pro-

[8] From Major Bailey's useful note on contracts drawn up for his Circle, I learn that in the North-Western Provinces instructions it is added (though this would be understood naturally) that a contract need not express that it is to be done and over by a certain date; a contract may be made to continue in force till notice is given by one party or the other. (Board of Revenue, $\frac{\text{No. 655}}{\text{VI—349}}$, November 19, 1880.) It is also stated that when a contractor is to get "commission" it should always be worded so as to be *entirely in the* option of the forest officer to give or withhold it; but I respectfully point out that the proposal to add a condition that the contractor cannot *sue for it in Civil Court* would be quite useless. The contract can make it so purely a question of favour that a suit *would* at once be dismissed; but no contract absolutely *not to sue* would be of any force.

posal is accepted. (Section 78.) The property does not pass in things not yet ascertained, or to be made, or prepared or provided (sections 79-80), nor does it pass where anything remains to be done to the goods by the seller in order to ascertain the price (section 81). *Example:* A Deputy Conservator agrees to sell 2,000 sleepers to a merchant at a price for first-class sleepers, on condition that he will pass the sleepers and mark as first-class, at a timber station named, after which the price is payable: the property does not pass till the sleepers have been marked at the timber station.

Some further particulars about ascertainment are provided by sections 82, 83, 84.

If goods are not ascertained, they become so by the selection of the one party assented to by the other.

When once the property has passed under the above rules the loss which may occur is the buyer's. (Section 86.)

In the case of sale of goods not only not ascertained, but *not in existence*, no right of property passes till, after production, some act is done in pursuance of the agreement of sale, by the seller, or by the buyer with the seller's assent.

Example.—An agreement to sell 2,000 sleepers to be made in a certain forest, the property passes as soon as the forest officer announces that (pursuant to the terms of the agreement), the sleepers are ready at the agreed place and held at the purchaser's disposal, or as soon as the purchaser, seeing the sleepers ready stacked at the place, takes possession with the forest officer's assent. (Section 87.) If the forest officer refused assent, the ownership could not pass, though there might be a case of breach of agreement.

Where no *price* is fixed, it is what the Court (for otherwise there will be no dispute and the terms will be agreed on) considers reasonable. (Section 89.)

§ 2.—*What is Delivery.*

We constantly speak in matters of sale, of the delivery of goods: what is delivery? Section 90 explains that it is doing

anything which has the effect of putting the materials purchased in possession[9] of the buyer, or of some one authorized by him to hold them on his behalf. The illustrations to this section may be read.

Delivery to a carrier of goods has the effect of a delivery to the buyer, but does *not* render him liable for the price, if the goods do not reach him, unless the delivery is so made that the carrier is responsible for the safe custody or delivery of the goods. (Section 91.)

A delivery of part of the goods "in progress of the delivery" of the whole, passes the ownership in the whole, but not if there is an intention of severing the part taken from the rest: then, only the part taken is delivered. (Section 92.) *Example:* A sells to B a stack of firewood to be paid for by B on delivery. B begins to take away the wood "in progress of" taking the whole, the ownership in the whole has passed; not so if B applied for and got leave from A to take away *a part* of the wood: the rest would not be 'delivered.'

If there is no proviso to deliver at a particular time or place, it is a rule that the seller is not bound to do anything till the buyer *applies* for delivery. (Section 93.) And in the absence of special provision, goods are held to be deliverable at the place in which they were when sold, or, if not in existence, where they will be when produced. (Section 94.)

§ 3.—*Title to Goods sold.*

Section 108 will give the general rule about the question of valid title to goods sold and the title that is passed by sale. The forest officer is not likely to sell goods other than those in which the title of the Government is clear by law. But the general rule is that the seller passes no better title than he had himself.

A general exception is in the case of sale of goods by a person in possession (or holding a bill of lading, and selling on the bill); here the property will pass if the *buyer acts in good faith, and there are*

[9] The student will remember what was said about 'possession' in the first chapter.

no circumstances which might reasonably have indicated to him that (the holder of the bill of lading, or) the person in possession, is not lawfully entitled to sell, or is not the real owner.

This provision replaces the English law rule of 'sale in market overt,' as it is called. This rule is not applicable in India, and is in itself a matter of custom, not easily applied as a general rule of law. The rule in the Indian Contract Act is quite sufficient. If, for example, you choose to buy a gold watch from a disreputable-looking person, who offers it for much less than it is worth, the circumstances at once should raise a suspicion that the man has stolen the watch; and if you take it you will have got it on no secure title, and the real owner can get it back; but if, in the absence of all such circumstances, you bought it, as if, *e.g.*, you found the watch in an open, respectable shop and bought it at a fair price, and yet if it should turn out to have been stolen, the owner could not make you give it up.

The same exception also holds good in case of a sale by *one of several joint owners.*

§ 4.—*Seller's Lien.*

There are some remaining features peculiar to the law of sale of goods, which will need a brief mention: the *seller's lien* for the price, and his right of *stoppage in transit* (which is only an extension of the former right in certain cases after the goods have left his possession on their way to the buyers) and the right of *re-sale.* The subject of warranty I shall not deal with.

As long as goods remain in possession of the seller, and the price is not paid (or any part of it), he has his lien, and need not part with the goods till paid (unless the contract specifies otherwise). (Section 95.) If there is an express contract that the payment is to be made at a future day, and no time is fixed for the delivery of the goods, there is no lien, and the buyer is entitled to present delivery. But if the buyer "ceases to pay his debts in the ordinary course of business," *i.e.*, becomes insolvent, and the goods have not been delivered, they may be detained till the price is paid

(section 96); and generally, if a buyer, though entitled to delivery, chooses to let the goods remain in the seller's possession and the day for payment passes without payment being made, the seller may then refuse to give up the goods till payment is made. (Section 97.) Nor will the fact that in the *interim* the buyer has sold the goods to some one else deprive the original seller of his lien, unless indeed he has recognized the title of the subsequent buyer. (Section 98.)

The right of stoppage in transit is, as I said, merely an extension of the lien after actual possession has been lost, and while recovery of the goods is still possible. It *only* arises in case the purchaser becomes "insolvent."

The subject is explained in sections 99-106, and need not be further mentioned here.

Re-sale is the necessary complement of the *lien* just spoken of. When its lien is in exercise, and the price is not paid, the seller may, after *giving notice* to the buyer and allowing the lapse of a reasonable time, *re-sell* the goods to recover the price, and the buyer (*i.e.*, the original buyer) must bear any loss, but is not entitled to any profit, which may occur on the re-sale. (Section 107.)

All this supposes that the goods have not yet actually passed out of the seller's possession, with an extension in the case of *transit*, where, though virtually out of the seller's possession, they are not yet in the buyer's.

But if once the buyer has got actual *possession*, then his failure to pay does not rescind the sale, but in the absence of special agreement otherwise, the goods are his property and the remedy is to sue him for the price, &c. (Section 121.)

§ 5.—*Sale by Auction.*

When a sale is by *auction*, there are some special legal rules rendered necessary by the circumstances of this kind of sale.

In the first place there is a separate sale of each lot, and the ownership passes in each as it is knocked down. (Section 122.)

If at an auction the seller "makes use of pretended biddings"

to raise the price, the sale is voidable at the option of the buyer. (Section 123.)

§ 6.—*Contracts of Guarantee.*

Contracts of guarantee[10] must also be spoken of. It will be in two cases that surety bonds are used,—one when a contractor gives security that he will repay advances, or faithfully fulfil his promises; another when a forest clerk, or treasurer, or a subordinate forest officer (in case this is ordered) gives security for faithful service and to account for all money he receives.

In these contracts we have already noticed that if a *penalty* is directly agreed on as forfeitable in case of misconduct, this sum is (exceptionally) recoverable: but only in the case of surety for faithful dealings of the duties of a *public* servant: and this rule does not apply to security on a Government contract merely because Government is one of the contracting parties, unless the contract is of such a nature that a Court can decide that the public is really interested in it. (See section 74.)

In a contract of guarantee, the consideration is somewhat special: the person who guarantees, say, the faithful conduct of A, a forest clerk, to the Deputy Conservator of a division, gets nothing directly from the Deputy Conservator; but the fact that the *principal* is benefited, that *he* gets salary or commission, or whatever it is, is legally held to be the consideration for the "surety's" agreement. (Section 127.)

In every case, unless the surety it liable only to the extent of a sum fixed in the contract, he is liable for whatever the principal debtor becomes liable for. (Section 128.)

The surety may be for one act or transaction or for a series (as in case of a surety for faithful services in a public office); in

[10] Defined in section 126. It is a contract to perform the promise, or discharge the liability of a third person in case of his default. The guarantor is called the "surety:" the person whose performance is guaranteed is the "principal debtor," and the person (Government in our case) is the "creditor." These contracts may be oral or written.

the latter case it is said to be a "continuing guarantee." (Section 129.)

The difference is this, that whereas the surety, having once contracted to answer for a specific act, cannot get off his bargain any more than he could off any other contract engagement, in a continuing guarantee he may at any time revoke his guarantee as to future transactions, by giving *notice* to the creditor (section 130); and in such continuing contract, the death of the surety operates as a revocation, as far as future transactions are concerned. (Section 131.)

If two persons contract as joint sureties, and then by special agreement between themselves agree that one shall only pay up in case the other fails, this will *not limit* the responsibility of both to the 'creditor,' *even though he was aware* of the arrangement. (Section 132.)

When a person becomes surety, and there is a variance in the terms of employment, made without the surety's consent, this operates as a discharge of the surety in respect of transactions after the variance (section 133); and generally, if the creditor does anything inconsistent with the rights of the surety, or omits to do what his duty to the surety requires him to do, so that the eventual remedy of the surety against the principal be impaired, the surety is discharged. (Section 139.) The illustrations given may be quoted thus:—

(*b*) A is surety for B against misconduct in his office, the duties of which are defined in an Act of the Legislature. By a subsequent Act "the nature of the office is materially changed." This operates as a discharge, and if B misconducts himself after the change A is not liable as surety, *even though the misconduct was on a point of duty which the subsequent Act did not touch.*

(*Or c*) A Divisional officer appoints A to manage a selling depôt for sawn timber at Amritsar. A is to get a monthly salary and account to the officer for all sales; C becomes

his surety. Afterwards the Divisional officer, without C's knowledge or consent, changes the salary to a commission on sales: C is not liable for any misconduct after the change. The consent of the surety to any such change cannot be *implied* from the mere fact of his knowledge and silence, but it may from the circumstances[1].

Another illustration (actually given under section 139) is one worth attention. Supposing A contracts with a Conservator to saw up 20,000 sleepers and to be paid by instalments at certain stages. C is surety. If the Conservator, to urge the work, without C's knowledge forestalls certain payments, C is discharged. It is obvious that the Conservator's action tends to make C's responsibility greater than C contemplated, since, at the given date, A's responsibility for the advances is greater than it would have been under the contract.

Whenever the principal debtor becomes legally discharged either by a contract with the creditor, *or by the effect of an act or omission of the creditor*, the surety is discharged (section 134); and so when the creditor agrees to give time, or not to sue, or makes a composition with the principal debtor for his liability, unless, of course, the surety assents. (Section 135.) But mere forbearance to sue or enforce any remedy does not (in the absence of special agreement) discharge the surety. (Section 137.) If there are co-sureties, a release of one does not discharge the others, nor save the one relieved from his liability to contribution to the others. (Section 138.) This is a mere repetition, in the particular case of sureties, of the general principle of all joint promises, which I have above noticed. (Section 44.)

A surety who has paid up on behalf of the principal debtor has all the rights which the 'creditor' had against the principal debtor (section 140); and is entitled to the benefit of every

[1] Authorities quoted in note to section 133 in Cunningham and Shepherd's Indian Contract Act.

security which the creditor had against the principal debtor at the time when the contract of suretyship was entered into, whether known to the surety or not; and if the creditor loses, or without the surety's consent parts with, such security, the surety is discharged to that extent. (Section 141.) Supposing, therefore, that a forest officer takes a mortgage of land, as his security, from a clerk, and also gets B to go security for him, if the officer gives up the mortgage the security will be discharged to the extent of the value of the mortgaged land.

But this, it will be remembered, applies to securities existing *at the time* when the surety contracted, not to others which the creditor may *subsequently* have taken.

Sureties are also protected by law by a still fuller adoption of the principle that *misrepresentation* may affect contracts. It is not in *every* case that misrepresentation renders voidable an ordinary contract (*see p. 457 ante*); but in surety contracts *every* misrepresentation concerning a material part of the transaction renders the contract voidable (section 142), and silence as to a material circumstance on the part of the creditor at once renders the guarantee so obtained invalid. (Section 143.)

Co-sureties for the same debt, even (though each is bound under a separate contract and does not know of the other's co-suretyship) are liable to pay up in equal shares (in the absence of agreement to the contrary (section 146), and co-sureties bound in different sums are bound to pay equally up to the limit of each sum fixed. (Section 147.) (*Example:* A, B, C are co-sureties for D. A's bond bears the limit of penalty of Rs. 10,000, B's of 4,000, and C's of 6,000. D defaults to extent of Rs. 18,000. B will have to pay 4,000 (as he cannot be made to pay more under his bond), C will pay Rs. 6,000 for the same reason, and A Rs. 8,000.

It is understood that every contract of guarantee carries with it an implied promise to the surety from the principal debtor, to reimburse him all sums which he has paid rightfully on his behalf, but not sums paid wrongfully. (Section 145.)

§ 7.—*On Dealings with Agents.*

The subject of agency I do not propose to treat in detail. The practical object is to put forest officers in a position to act in ordinary cases legally, where their dealings are with a person or a firm through an agent.

I am, therefore, to look at the agent here merely as the medium of communication between the principal and the third party (the forest officer). As *representatives* of the principal, it is not necessary that the agent should be capable of contracting. In other words, a principal might be bound by the act of an agent, though the latter was a minor. As a matter of practice, a person would not employ a minor as agent, because, though the representation would be valid, the minor agent could not be bound by any terms of a contract between him and his principal. (Section 184.)

Speaking, generally, of the contract of agency as between the employer and the agent, that of course depends on the general rules of contract, only that it is said that *consideration* is not necessary to a contract of agency (section 185), and that a person may contract to act as agent for one without getting any pay from one, or any other tangible consideration. But the distinction is only in appearance, because, obviously in a voluntary agency, some consideration must exist: the agent likes the position and gains credit by it, or does it out of the love he bears to his employer, or some motive of the kind, so it is hard to say there is actually no consideration.

The authority of an agent may be expressed by words said or by the written terms of a power, or it may be implied by the course of business. (Sections 186-7.)

Example.—A owns a shop in Calcutta, which he occasionally visits. B is in charge of the shop, and as such, is in the habit of ordering goods in the name of A, for the purposes of A's business and paying for them out of A's funds with A's knowledge. Here B has an implied agency to order goods.

An agent having authority to do an act or carry on a business has authority to do everything lawful which is necessary in order to

do the act, or to carry on the business, or whatever is usually done in the course of conducting such business. (Section 188.)

In an *emergency*, the agent may do all acts, for the protection of his principal from loss, that a private person of ordinary prudence would do under similar circumstances in his own case. (Section 189.) See also section 237 as to belief induced, that certain things were within the authority of the agent.

§ 8.—*Sub-Agent.*

An agent cannot delegate his power to a sub-agent unless by the custom of trade a sub-agent may, or from the nature of the business must, be employed. But where a sub-agent is properly employed, the principal is, as far as third parties are concerned, responsible for the sub-agent just as if he had appointed him himself. (Section 192.)

If a sub-agent is employed without authority, the agent employing him becomes his principal and is responsible for him to his own principal, and to third persons, but the original principal is not responsible. (Section 193.)

But if an agent has an express or implied authority from his principal to employ another person to act *for the principal in the business of the agency*, such person so made is not a sub-agent but a direct agent as well as the other. (Section 194.)

§ 9.—*Ratification.*

A person may not have given authority for certain acts, but if he *ratifies* them afterwards, that will have the same effect as if he had originally given authority (section 196), except in the case mentioned. (*Vide* section 200.) Such ratification may be expressed or implied by conduct. (Section 197). But it is essential to ratification that the person should have materially sufficient knowledge of the facts (section 198), but if he ratifies part of one whole transaction he ratifies the whole. (Section 199.)

§ 10.—*Revocation.*

An agent's authority may be terminated by revocation, or by the principal dying or becoming of unsound mind, or adjudicated insol-

vent (section 201), but not to the prejudice of the agent if the latter have an interest in the business. (Section 202.)

The revocation will not however affect acts already done, and obligations already incurred. (Section 204[2].)

Neither revocation nor renunciation by the agent will affect third parties *before it becomes known to them.* (Sections 201-8.)

§ 11.—*Certain relations not considered.*

I have already observed that my object being to inform forest officers of any rule of law which it may concern them to know in case they have to deal with agents, I omit all notice of an agent's duty to his principal (sections 211-21), or the principal's duty to the agent. (Sections 222-24.)

As regards third parties all contracts made with the agent may be enforced and have the same legal consequences as if made with the principal. (Section 226.)

Any notice given to or information obtained by the agent (*given in the course of business*) has the same effect as if given to or obtained by the principal. (Section 229.)

§ 12.—*Personal Liability of Agent.*

An agent as such does not personally enforce, nor is personally responsible for, contracts entered into on behalf of his principal, except—

(1) When the principal is not disclosed.

(2) When the principal, though disclosed, cannot be sued.

(3) In case the principal is a merchant resident abroad, in a matter of sale or purchase of goods. (Section 230.)

§ 13.—*Dealing with Person not known to be Agent.*

If a person contracts with an agent, not knowing, nor "having reason to suspect," that the person is an agent, (but supposing that he is a principal,) the real principal can require the performance of the contract; but the person dealing has the same

[2] The agent also may renounce his employment, but in this case or in the case of revocation, either party must give reasonable notice if there is an agreement for continued agency, or agency for a time fixed. Compensation may also be due.

rights against him as he would have had against the agent with whom in ignorance he was dealing. This is also subject to the condition that if the real principal is disclosed before the contract is actually fulfilled, the other party may refuse to fulfil, on showing that if he had known who was principal, or if he had known that the agent was *not* principal, he would not have entered into the contract. (Section 231.)

And the real principal, on requiring performance of the contract, can only obtain it subject to all rights and obligations subsisting between the agent and the person in question. (Section 232.)

An example of this in the Act is, that A, who is Rs. 500 in B's debt, sells B rice to the value of Rs. 1,000. Here, of course, B would pay for the rice Rs. 500 only, since he was already owed Rs. 500 by the seller. Meanwhile B has no suspicion that A is not working for himself but for C, who is the real principal. Here C can insist on B's taking the rice (just as A could), *but* subject to the same rights and obligations, *i.e.*, he could not insist on B's paying the whole price without allowing him to set-off A's debt[3].

If the agent is, under any circumstances, personally liable, the person dealing with him has the option of holding either him or the principal, or both, liable[4]. (Section 233.)

§ 14.—*Pretence of being Agent.*

A person untruly representing himself to be an agent is liable to make compensation for any loss, in case the principal for whom he pretended to act does not ratify his acts (section 235), nor can he

[3] The following is a recent case actually decided. P dealt with R and Company as principals, and sold them goods on credit. Before payment R and Company became bankrupt. P then discovered that R and Company had all along been buying as agents for an undisclosed principal D; but D *had in fact paid R and Company* for the goods before their insolvency. Here it was held that P could not recover over again from D, the price of goods supplied to R and Company, after the *bonâ fide* payment by D to them (at a time when P was quite content, and was giving credit to R and Company as principals). But he could hold D liable if he had not yet paid, or had paid improperly.

[4] The example given is that A contracts with B to sell him 130 bales of cotton, and afterwards discovers that B is C's agent; he may sue B or C, or both, for the price of the cotton.

require performance of the contracts on his own account. (Section 236.) Reference should here be made to section 230, in which it is stated that an agent cannot personally enforce contracts, nor is liable on them, except where he does not disclose his principal, or where the principal, though disclosed, cannot be sued. Here we see the difference when the person *pretends* untruly to be an agent. In this case he cannot enforce the contract, but he is liable to compensate any loss consequent on his pretence.

If an agent makes any misrepresentation, or acts fraudulently in respect of matters in the scope of his authority, the misrepresentation or fraud will have the same effect on the contract as if it was the principal's own, but not so in matters not falling within his authority. (Section 238.)

§ 15.—*Forest Officers as Agents for Government.*

Nothing is said in the Act about public servants making contracts as agents for the Government. I have already said something about their powers in this respect. But the rule of law is that a public servant making a contract as such, is not personally liable at all, even under circumstances, which if he were a *private agent*, might make him personally liable. The reasons of this are stated to be, first, that persons who enter into contracts with public servants know that they do not look to them personally at all; next, that if public servants were liable, no one would undertake the office for fear of the risk. It may, however, be shown that a person dealt with a public servant not knowing that he was such, and that there was an intention for personal liability.

Nor do the *admissions* of a Government servant (as agent) bind the Government, unless it clearly appears that they were authorized to make them. Nor can Government officers be held responsible for the neglect of their subordinates[5].

Lastly, I have to observe that I have given no instances in

[5] Secretary of State *versus* Kamachee Boya, 7, Moore's Indian Appeals, 476 and Collector of Masulipatam *versus* Cavaly Vencata Narrainapa, Id, vol. 8, p. 554. See also the chapter on the organization of Forest Service—"Legal Protection of Forest Officers."

which the Government servant as an agent enters into contracts to produce goods or supply them in the future; because under no circumstances should a forest officer enter into such engagements. His only contracts as regard timber and other forest produce should be sales of material in existence and at a certain place.

It is impossible for a forest officer to have that command of his business and of money that a trader has. He should therefore always say, "I expect such and such sleepers or logs (or whatever it is) at such and such a timber station, or to be ready in such and such a time, and I will do my best, but I cannot bind Government that they will be there, either on a certain date or of a certain quality or condition, nor can I make Government liable in possible damages because the material is not produced."

When dealing with a State Railway even, although one department of Government would not claim damages against another, or go to law, still the forest officer should always guard himself against actual promises for the future. He may explain the state of his work, show the Engineers the probability of sleepers, or whatever it is, being in depôt by a certain time, and may, and indeed is bound to, use his utmost effort to supply the public service promptly and according to expectations, but more than that he should never do.

§ 16.—*Dealings with a Firm.*

In the same way as a forest officer may deal with *agents*, he may also deal with *a partner* in a firm or partnership.

The relations of partners among themselves, and of the partners to third parties, form the concluding chapter of the Contract Act. This subject, however, I regard as beyond the scope of this work, but I will mention just those sections which will keep a forest officer from mistake in dealing with a partnership or "firm."

Every partner (and any one consenting to allow himself to be represented as a partner, in case credit is given on the faith of such consent (section 246) is liable for all debts and obligations of the firm existing at the time.